

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LABORERS' DISTRICT COUNCIL	:	
CONSTRUCTION INDUSTRY	:	
PENSION FUND, et al.	:	CIVIL ACTION
	:	
v.	:	05-cv-02625
	:	
TERRA ENVIRONMENTAL	:	
CONTRACTORS, INC.	:	

MEMORANDUM

Juan R. Sánchez, J.,

August 16, 2007

Philadelphia Laborers' District Council Benefit Funds and the Laborers' District Council seek benefit fund contributions owed by Terra Environmental Contractors, Inc. Plaintiffs argue Terra failed to make contributions for certain employees who performed work covered by the Collective Bargaining Agreement. Terra responds Plaintiffs are attempting to collect contributions for employees who did not perform covered work. Because I find Terra has failed to rebut the Plaintiffs' audit, I will find in favor of the Plaintiffs and order Terra to make payments accordingly.

FINDINGS OF FACT

1. Plaintiff, The Laborers' District Council Construction Industry Pension Fund, is a trust fund established and maintained pursuant to Section 302(c) of the Labor Management Relations Act (LMRA), 29 U.S.C. §186(c)(5), and is an employee benefit plan established and maintained pursuant to §§ 3(1) and (3) of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§1002(1) and (3), maintained for the purpose of providing pension retirement benefits to eligible participants.
2. Plaintiff, Laborers' District Council Building and Construction Health and Welfare Fund, is a trust fund established and maintained pursuant to §302(c)(5) of the LMRA, 29 U.S.C. §186(c)(5), and is an employee benefit plan established and maintained pursuant to §§3(1)

and (3) of ERISA, 29 U.S.C. §§1002(1) and (3), maintained for the purpose of providing health benefits and other welfare benefits to eligible participants.

3. Plaintiff, The Laborers' District Council Education and Training Fund, is a trust fund established and maintained pursuant to §302(c)(5), of LMRA, 29 U.S.C. §186(c)(5), and is an employee benefit plan established and maintained pursuant to §§3(1) and (3) of ERISA, 29 U.S.C. §1132(d)(1).
4. Plaintiff, The Laborers' District Council Prepaid Legal Fund, is a trust fund established and maintained pursuant to §§3(1) and (3) of ERISA, 29 U.S.C. §§1002(1) and (3), to provide prepaid legal benefits to eligible participants.
5. Plaintiff, Laborers' District Council of the Metropolitan Area of Philadelphia and vicinity, Laborers' International Union of North America, is an unincorporated labor organization engaged in representing employees for collective bargaining.
6. Plaintiff, Laborers' – Employers' Cooperation and Education Trust, is a trust fund established and maintained pursuant to §§302(c)(5) of LMRA, 29 U.S.C. §186(c)(5), and is an employee benefit plan established and maintained pursuant to §§3(1) and (3) of ERISA, 29 U.S.C. §1132(d)(1).
7. Plaintiff, Laborers' District Council Local, Regional and State Health and Safety Benefit Fund, is a trust fund established and maintained pursuant to §302(c)(5) of LMRA, 29 U.S.C. §186(c)(5) and is an employee benefit plan established and maintained pursuant to §§3(1) and (3) of ERISA, 29 U.S.C. §§1002(1) and (3), to provide health and other welfare benefits to eligible participants.
8. Plaintiff, Employing Bricklayers Association of Delaware Valley, is a non-profit corporation representing employers in the commercial and institutional construction industry for collective bargaining.
9. Defendant, Terra, is an employer affecting commerce within the meaning of §§3(5), (11) and (12) of ERISA, 29 U.S.C. §§1002(5), (11) and (12) and sections (6) and (7) of the National Labor Relations Act, as amended, 29 U.S.C. §152(2), (6) and (7).
10. Terra and Plaintiffs (collectively "Funds") were parties to a Collective Bargaining Agreement (CBA) in effect from July 1, 2003 through September 30, 2005. The CBA requires Terra make contributions to the Funds when an employee performs laborer's work. Laborer's work includes: demolition; concrete work; clean-up work; the moving and handling of materials; loading and unloading of supplies; legging and case-on work; shovel work; compaction of dirt; building of scaffolding; as well as shop work which includes the distribution, cleaning, and reconditioning of tools. Although a "Supervisor" does not perform covered work, a "Foreman" or "Working-Supervisor" performs laborer's work in

addition to telling laborers where to go. A Foreman would also have the ability to hire and fire laborers.

11. Terra agreed to abide by the terms of the CBA and the Declaration of Trust of the plaintiffs' Fund (Trust Agreements).
12. Under the Labor Contract and/or Trust Agreements, Terra agreed to make full and timely payments on a monthly basis to the Funds as required by the Labor Contract on behalf of all individuals covered by the CBA and to pay interest, liquidated damages, all costs of litigation including attorney's fees expended by the Funds to collect any amounts due as a result of Terra's failure to comply with the CBA.
13. The CBA also required Terra to cooperate in an audit of its payroll records to insure compliance with the CBA.
14. Terra was notified by the Funds' auditors, Perry N. Blackman, CPA, of its intent to audit Terra's payroll records.
15. The Funds filed the instant lawsuit to ensure cooperation with the audit process and to recover any and all amounts owed to the Funds.
16. After the audit was complete, the Funds sought feedback from Terra to ensure the accuracy of the audit, and adjusted the amount owed accordingly.
17. The audit revealed Terra failed to keep adequate records or other evidence of covered work establishing which employees performed laborer's work during the relevant time period.
18. Terra acknowledges liability for the following individuals, totaling \$345,100.14 owed to the Funds. This amount remains unpaid.
 - a. Joseph Buchanan
 - b. Rechie Davis
 - c. Clyde Devlin
 - d. Herbert Dickens
 - e. Marc W. Farrell
 - f. Herbert Jacobs
 - g. Rodney Jacobs
 - h. William Mack
 - i. Kim March
 - j. Robert McCaffery
 - k. Stephen Paxton
 - l. Mateo Rivera
 - m. Thomas Eck
 - n. Byron Gans

o. Marcus Gans
p. Jerod Gibbs
q. Marvin Harper
r. David Heinz
s. Otto Heinz
t. Donald Hientz
u. Terrence Baker
v. Shawn Blanks
w. James Bonner
x. James Bright
y. Gregory Brown
z. Ronald Carter
aa. Octavia Cooper
bb. Joe Hogan
cc. James Howard
dd. Herbert Jacobs, Jr.
ee. Andrew Jacobs
ff. Anthony Jacobs
gg. John Jacobs
hh. Larry Jacobs
ii. Tyrone Jacobs
jj. Rashaun Johnson
kk. Michael Jones
ll. Richard Landis
mm. Nathaneil Morton
nn. Tyrone Palmer
oo. Gregory Parker
pp. Craig Penton
qq. Odilio Ramos
rr. Joshua Resser
ss. Thomas Reeser
tt. Anthony Robinson
uu. Larry Seymour
vv. Theodore Slater
ww. Danielle Smith
xx. Benjamin Stewart
yy. Michael Trost
zz. Kevin Watkins
aaa. Erika Wilson
bbb. Norman Coleman
ccc. Michael Foreman
ddd. David Gibson
eee. Feliz Herrera

- fff. Reginald Johnson
- ggg. Kevin Oliver
- hhh. Patrick Swank
- iii. Donald Watson

19. I accept the Funds stipulation Terra is not liable for unpaid contributions related to Jeffrey Corcoran, Keith Hoffman, and Andrew Ross.
20. The following individuals performed laborer's duties as defined by the CBA and were not operating engineers as claimed by Terra. None of these individuals were reported by Terra to the Operating Engineer's Benefit Funds. Terra's own payroll and work records suggest these employees were laborers. Additionally, affidavits submitted by Terra on behalf of certain employees classifying those individuals as "operators" are not instructive because they do not provide any information regarding their actual duties, job responsibilities, or the type of equipment used. I do not accept as credible Terra's evidence these individuals were operating engineers. I find these individuals performed laborer's work as defined by the CBA.
 - a. Jose Rosario Ortiz
 - b. Daryl Short
 - c. Ronnie Vila
 - d. Jonathan Charsha
 - e. Guillermo Ochoa
 - f. Armando Gonsalez
 - g. Sebastian Guerrero
 - h. Victor Perez
 - i. Alberto Robles
 - j. Armando Vallejo
 - k. J. Delores Casas-Ortiz
 - l. Martin Escandon
 - m. Kevin Harkleroad
 - n. Benjamin Perez
 - o. Delfino Resendiz
 - p. Ramon Trujillo
 - q. Guillermo Mendoza
 - r. Mario Hernandez Mercado
 - s. Miguel D. Lucas Morel
 - t. Hector A. Lucas Morel
 - u. Ronald Wiggins
 - v. Tomas Erwin
 - w. Scott Ponti
 - x. Wilcar Perez
 - y. Jason Bittle
 - z. Bart Baylson

- aa. Solomon Lopez
 - bb. Selvin Joel-Lopez
 - cc. Bruce Parsons
 - dd. Edmond DeJesus
21. The following individuals performed laborer's duties as defined by the CBA during the relevant time period . I do not accept as credible Terra's evidence these employees were part-time shop workers because Terra's own records contradict this assertion. I find these individuals performed laborer's work as defined by the CBA.
- a. Carlos Adrian Rivera Martinez (Adrian Martinez)
 - b. Rene Trujillo
22. The following individuals performed laborer's duties as defined by the CBA during the relevant time period. I do not accept as credible Terra's evidence these employees were mechanics because Terra's own records contradict this assertion. I find these individuals performed laborer's work as defined by the CBA.
- a. Jorge Colin-Robello
 - b. Samuel Martinez
23. The following individuals performed laborer's duties as defined by the CBA during the relevant time period. I find these individuals performed laborer's work because Terra presented evidence they performed work as welders, and the CBA identifies welding as laborer's work.
- a. Edgar Ortiz-Lugo
 - b. Ramon Tereso Ortiz
 - c. Humberto Hernandez
24. The following individuals performed laborer's duties as defined by the CBA during the relevant time period. Despite Terra's assertion these employees worked as "Worthington Steel Millwrights," I find Terra made no contributions to the Millwright Union Benefit Funds on their behalf. These individuals performed demolition work and as such, performed laborer's work as defined by the CBA.
- a. George DeHaven
 - b. David Fuchs
 - c. Gary Hinerman
 - d. Dennis Scheno
 - e. Thomas Stacey, IV
 - f. Galen Stoltzfus
 - g. Timothy Stoltzfus
 - h. Horace Trego
25. The following individuals performed laborer's duties as defined by the CBA during the relevant time period. I do not accept as credible Terra's evidence these employees were

interns because Terra's own records contradict this assertion. I find these individuals performed laborer's work as defined by the CBA.

- a. James W. Miller
- b. Justin Miller

26. I do not accept as credible Terra's evidence Mark Hanley was a Supervisor because Terra's own records contradict this assertion. I find Hanley was a Foreman or Working Supervisor and as such performed laborer's work as defined by the CBA.

27. The following individuals performed laborer's duties as defined by the CBA during the relevant time period. Despite Terra's assertion these employees worked as drivers, I find Terra made no contributions to Teamsters Union on their behalf and none of these employees carried a commercial drivers license. Although these individuals did perform work as drivers, they primarily transported materials and machinery to job sites, engaged in loading and unloading of trucks, and performed work on certain job sites. Because work transporting and loading materials is work covered by the CBA, I find these individuals performed laborer's work.

- a. William Ferrell
- b. John H. Phillips, Jr.
- c. Fulton Qareeb
- d. Michael Shipman
- e. David Warner
- f. James Choquette
- g. Gary Kniple
- h. Richard C. McClain, II

28. Terra failed to provide any evidence to contradict the testimony of the Funds' witnesses or otherwise indicate the Funds findings were incorrect with respect to the following individuals.

- a. Darnell Ballard
- b. James Evans
- c. George Harris
- d. Kevin Hurtt
- e. Michael Kristman
- f. Richard Lehr, Jr.
- g. Keith Loveland
- h. Charles Molla
- i. Gordon Morris
- j. John Taylor
- k. John Thislewood
- l. Donald Vandevender
- m. Darryl White
- n. Edmundo Arguello

- o. Eugenio Arguello
- p. Joseph Bradley
- q. Ray Carper
- r. Efigenio Casas
- s. Juan Ceja
- t. Mauricio Cervantes
- u. Leonardo Cordero
- v. Dominic Delcampo
- w. Javier Espinosa
- x. Michael Foreman
- y. Jorge Lopez Fuentes
- z. Ivan Gonzalez
- aa. Michael Irwin
- bb. Jose Iver
- cc. Jose Lucas
- dd. Ramon Ochoa
- ee. Gerardo Ortiz Perez
- ff. Jason Pollock
- gg. Marvin Ramirez
- hh. Isidro Reina
- ii. Jose Rivera Valerio
- jj. Pedro Rivera
- kk. Victor Romero
- ll. Luis Sanchez
- mm. Filiberto Aguilera
- nn. Terrence Barker
- oo. Michael Burns
- pp. Sandoval Cigarra
- qq. Irving Giles
- rr. Amos Luogo
- ss. Robert Meeks, Jr.
- tt. Thomas Morley
- uu. Mendez Octavino
- vv. Ryan Ray
- ww. Jadyr Manolo Zacarias

- 29. The unpaid contributions requested by the Funds accrued \$374, 238.31 in interest.
- 30. The Funds incurred audit fees in the amount of \$17,525.00.
- 31. The Funds incurred attorney's fees in the amount of \$18,090.46 through October 2, 2006. and additional attorney's fees in the amount of \$27,448.00 subsequent to October 2, 2006.

32. The parties stipulated the Funds' attorney's fees are reasonable.
33. Terra is indebted to the Funds for \$7,809.04 in interest on untimely paid benefit fund contributions.

CONCLUSIONS OF LAW

1. Terra violated §515 of ERISA, §29 USC §1145 because it failed to pay benefits for 105 employees performing laborer's work under the CBA.
2. The Funds are entitled to recover interest, counsel fees and costs, and audit fees pursuant to the CBA and 29 USC §1132(g)(2).
3. If an employer fails to maintain adequate records and fails to come forward with other evidence of covered work, then the employee benefit funds are entitled to approximate the contributions owed to them. *See Combs v. King*, 764 F.2d 818, 826 (11th Cir.1985) (holding "[i]f the employer fails to produce such evidence [of covered work], the court may then award damages to the employee, even though the result be only approximate.") (quoting *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687-688 (1946)); *see also Brick Masons Pension Trust v. Industrial Fence and Supply*, 839 F.2d 1333, 1338 (9th Cir.1988) (finding "an employer cannot escape liability for his failure to pay his employees the wages and benefits due to them under the law by hiding behind his failure to keep records . . ."). I find Terra failed to maintain adequate records and failed to rebut the Funds' evidence of covered work presented at trial.
4. The following people are laborer's under the CBA and Terra is liable to the Funds for contributions on their behalf.
 - a. Alberto Robles
 - b. Amos Luogo
 - c. Armando Gonsalez
 - d. Armando Vallejo
 - e. Bart Baylson
 - f. Benjamin Perez
 - g. Bruce Parsons
 - h. Carlos Adrian Rivera Martinez (Adrian Martinez)
 - i. Charles Molla
 - j. Darnell Ballard
 - k. Darryl White
 - l. Daryl Short
 - m. David Fuchs
 - n. David Warner
 - o. Delfino Resendiz
 - p. Dennis Scheno

q. Dominic Delcampo
r. Donald Vandevender
s. Edgar Ortiz-Lugo
t. Edmond DeJesus
u. Edmundo Arguello
v. Efigenio Casas
w. Eugenio Arguello
x. Filiberto Aguilera
y. Fulton Qareeb
z. Galen Stoltzfus
aa. Gary Hinerman
bb. Gary Kniple
cc. George DeHaven
dd. George Harris
ee. Gerardo Ortiz Perez
ff. Gordon Morris
gg. Guillermo Mendoza
hh. Guillermo Ochoa
ii. Hector A. Lucas Morel
jj. Horace Trego
kk. Humberto Hernandez
ll. Irving Giles
mm. Isidro Reina
nn. Ivan Gonzalez
oo. J. Delores Casas-Ortiz
pp. Jadyr Manolo Zacarias
qq. James Choquette
rr. James Evans
ss. James W. Miller
tt. Jason Bittle
uu. Jason Pollock
vv. Javier Espinosa
ww. John H. Phillips, Jr.
xx. John Taylor
yy. John Thislewood
zz. Jonathan Charsha
aaa. Jorge Colin-Robello
bbb. Jorge Lopez Fuentes
ccc. Jose Iver
ddd. Jose Lucas
eee. Jose Rivera Valerio
fff. Jose Rosario Ortiz
ggg. Joseph Bradley

hhh. Juan Ceja
iii. Justin Miller
jjj. Keith Loveland
kkk. Kevin Harkleroad
lll. Kevin Hurtt
mmm. Leonardo Cordero
nnn. Luis Sanchez
ooo. Mario Hernandez Mercado
ppp. Mark Hanley
qqq. Martin Escandon
rrr. Marvin Ramirez
sss. Mauricio Cervantes
ttt. Mendez Octavino
uuu. Michael Burns
vvv. Michael Foreman
www. Michael Irwin
xxx. Michael Kristman
yyy. Michael Shipman
zzz. Miguel D. Lucas Morel
aaaa. Pedro Rivera
bbbb. Ramon Ochoa
cccc. Ramon Tereso Ortiz
dddd. Ramon Trujillo
eeee. Ray Carper
ffff. Rene Trujillo
gggg. Richard C. McClain, II
hhhh. Richard Lehr, Jr.
iiii. Robert Meeks, Jr.
jjjj. Ronald Wiggins
kkkk. Ronnie Vila
llll. Ryan Ray
mmmm. Samuel Martinez
nnnn. Sandoval Cigarra
oooo. Scott Ponti
pppp. Sebastian Guerrero
qqqq. Selvin Joel-Lopez
rrrr. Solomon Lopez
ssss. Terrence Barker
tttt. Thomas Morley
uuuu. Thomas Stacey, IV
vvvv. Timothy Stolfus
www. Tomas Erwin
xxxx. Victor Perez

yyyy. Victor Romero
zzzz. Wilcar Perez
aaaaa. William Ferrell

5. Terra is obligated to pay the Funds \$1,764,905.00 for unpaid contributions.
6. Terra is obligated to pay the Funds \$374,238.31 for interest on unpaid contributions.
7. Terra is obligated to pay the Funds \$18,090.46 plus \$27,448.00 to reimburse the Funds for attorney's fees and costs pursuant to the CBA and 29 U.S.C. §1132(g)(2).
8. Terra is obligated to pay the Funds \$17,525.00 for audit fees pursuant to 29 U.S.C. §1132(g)(2) and the CBA.
9. Terra is obligated to pay the Funds \$7,809.04 in interest on untimely paid benefit fund contributions.

An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LABORERS' DISTRICT COUNCIL	:	
CONSTRUCTION INDUSTRY	:	
PENSION FUND, et al.	:	CIVIL ACTION
	:	
v.	:	2:05-cv-02625
	:	
TERRA ENVIRONMENTAL	:	
CONTRACTORS, INC.	:	

ORDER

AND NOW, this 16th day of August, 2007, pursuant to Federal Rule of Civil Procedure 58 and this Court's Memorandum of August 16, 2007, it is ORDERED that Judgment be entered in favor of Plaintiffs: Laborers' District Council Construction Industry Pension Fund; Laborers' District Council Building and Construction Health and Welfare Fund; Laborers' District Council Education and Training Fund; Laborers' District Council Prepaid Legal Fund; Laborers' District Council of the Metropolitan Area of Philadelphia and Vicinity Laborers' International Union of North America; Laborers' -Employers' Cooperation and Education Trust; Laborers' District Council Local, Regional, and State Health and Safety Benefit Fund; and Employing Bricklayers' Association of Delaware Valley; and against Defendant Terra Environmental Contractors, Inc.

It is FURTHER ORDERED Defendant Terra shall make payments to Plaintiffs in the amounts of \$1,764,905.00 for unpaid contributions, \$374,238.31 for interest on the unpaid contributions, \$45,538.45 for attorney's fees and costs, \$17,525.00 for audit fees, and \$7,809.04 for interest on untimely paid benefit fund contributions in accordance with the Memorandum.

The Clerk is directed to mark the above-captioned case as CLOSED for statistical purposes.

BY THE COURT:

/s/ Juan R. Sánchez

Juan R. Sánchez, J.